KONNAS MARITIME SERVICES SDN BHD

v.

ADI NEGARA KAMARUDDIN

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-22-2001
7 MARCH 2002

LABOUR LAW: *Employment - Dismissal - Misconduct - Industrial Court - Award that dismissal was without just cause for failure to prove misconduct beyond reasonable doubt - Whether Industrial Court applying wrong standard of proof - Whether had misdirected itself - Whether decision perverse and unreasonable - Whether certiorari to issue*

The respondent was dismissed from the employment of the applicant when a domestic inquiry convened by the latter found him guilty of two counts of misconduct, namely: (i) that he had fraudulently misrepresented himself as a representative of another company ('Lippowak') while being gainfully employed by the applicant; and (ii) that he was negligent in returning a cheque issued by a company ('Milupol') without obtaining a replacement cheque thereof. Following a complaint for unfair dismissal, the Industrial Court found that fraudulent misrepresentation had not been proved against the respondent beyond a reasonable doubt, that the respondent had not benefited from the alleged misconduct, that the applicant's failure to call one Frederick Wong Tiew Seh from Lippowak to testify on whether or not the respondent was authorised to sign on behalf of Lippowak was fatal to the applicant's case, and in the circumstances, ruled the dismissal to be without just cause and excuse. The applicant applied for *certiorari* to quash the award and the primary issue that arose was whether the Industrial Court, in so awarding, had misdirected itself in law.

Held (allowing the application):

[1] The Industrial Court was addressing its mind on the issue of whether or not the company had proven beyond a reasonable doubt that the misconduct was committed by the claimant. In so doing, the Industrial Court had committed a fundamental error in law in that it failed to apply its mind to the correct test applicable, ie, a standard of proof on a balance of probabilities. The Industrial Court's erroneous reliance on a beyond

reasonable doubt standard of proof had affected the entire basis of its award, as it had resulted in a decision that was perverse and unreasonable and which no other tribunal in similar circumstances would have reached. On this ground alone an order of *certiorari* should be issued. (pp 373 d-f & 375 d)

[2] The first charge against the respondent would have been proven as long as the applicant had adduced evidence that showed that the respondent had misrepresented himself as a representative of Lippowak whilst in employment with the applicant. In this regard, the Industrial Court had failed to consider COW1's evidence that the respondent had no authorisation to sign on behalf of Lippowak or that he had in fact signed on behalf of the Managing Director of Lippowak. The Industrial Court had also failed to consider that the applicant had suffered losses arising from the respondent's misconduct. Surely, all this amounted to negligence on the part of the respondent in failing to exercise due diligence and good commercial sense. (p 378 a-d)

[2a] In the light of the above, there was clearly no requirement to call Frederick Wong Tiew Seh as a witness. The Industrial Court also gave no reason for rejecting COW1's evidence, nor was it rejected on grounds of credibility. Accordingly, there was a failure by the Industrial Court to weigh the documentary and oral evidence before it on a balance of probabilities. This amounted to a misdirection in law. (p 378 d-e)

[3] The issue of whether the respondent stood to gain personally from his act was irrelevant as, for all intents and purposes, he had no authorisation to sign on behalf of another company when he was in the applicant's employment. On the facts, the respondent had clearly made a false misrepresentation *inter alia* to Johore Port. Whether or not the respondent stood to gain anything personally from such act was immaterial, as the fact remained that he was not given any authorisation to sign the way he did. In taking such an irrelevant consideration, the Industrial Court had also arrived at a decision which was perverse and unreasonable. (pp 378 g-h & 379 c-d)

[4] The Industrial Court had completely misconstrued the second charge aforesaid. The essence of the charge was that the respondent had negligently failed to exercise due diligence and good commercial sense when he returned the cheque issued by Milupol without obtaining a

replacement cheque thereof. The Industrial Court had failed to consider that it was the respondent's conduct that stopped the cheque from being banked in, thereby causing losses to the applicant. These were matters that went to the crux of the charge, but the Industrial Court had chosen to demonstrate blatant disregard for the same. (p 379 h)

[Certiorari to issue]

Case(s) referred to:

Ang Hiok Seng v. Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased) [1997] 1 CLJ 497 FC ***(refd)***

Anwar Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 CA ***(refd)***

AS v. AT Xavier [1983] 1 ILR 4 ***(refd)***

Bayer (M) Sdn Bhd v. Anwar Abdul Rahim [1996] 2 CLJ 49 HC ***(refd)***

Derry v. Peek [1889] 14 App Cas 337 ***(refd)***

Ferodo Ltd v. Barnes (EAT) [1976] ICR 439 ***(refd)***

Funai Electric (M) Sdn Bhd v. Saliah Ahmad [2000] 2 CLJ 655 HC ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 CA ***(refd)***

Konnas Maritime Services Sdn Bhd v. Adi Negara Kamarudin [2001] 2 ILR 246 ***(refd)***

OMX Agro Produce (M) Sdn Bhd v. Chairman Industrial Court Malaysia & Anor [1999] 5 MLJ 636 ***(refd)***

R. Rama Chandran v. Industrial Court of Malaysia & Anor [1977] 1 CLJ 147 ***(refd)***

Shell Malaysia Trading Co Sdn Bhd v. National Union of Petroleum & Chemical Industry Workers [1986] 1 ILR 677 ***(refd)***

Utusan Melayu (M) Bhd v. National Union of Journalist Malaysia [1991] 2 ILR 840 ***(refd)***

For the applicant - S Suganthi; M/s Shearn Delamore & Co
For the respondent - Mohd Noor Darus; M/s Fisol, Aziz & Mohd Noor

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

This is an application by the applicant for an order of *certiorari* to quash the decision of the Industrial Court in Award No. 39 of 2001 wherein the Industrial Court held the respondent's dismissal to be without just cause/excuse. The court also awarded the respondent backwages and compensation *in lieu* of reinstatement.

The facts of the case are as follows: By a letter dated 5 August 1998, the respondent was required to show cause to 7 charges contained in the said letter. The respondent replied to the charges by a letter dated 11 February 1998. By letter dated 25 February 1998, the applicant informed the respondent

that his reply was unsatisfactory and that an inquiry was to be conducted in respect of the charges leveled against him. The domestic inquiry proceeded as scheduled on the 9 March 1998. The board of inquiry found the respondent guilty of 2 of the charges merely charges (f) and (h) and recommended his dismissal. Accordingly the respondent was dismissed with effect from 13 April 1998.

Pursuant to representations made by the respondent under s. 20(1) of Industrial Relations Act 1967, the Honourable Minister of Human Resources referred the respondent's dismissal to the Industrial Court under s. 20(3) of the Industrial Relations Act 1967. The reference was subsequently registered as Industrial Court case No. 3/4-426/99. At the conclusion of the hearing, all parties were directed to put in written submissions, pursuant to which the Industrial Court handed down its decision in Award No. 39 of 2001 dated 26 January 2001. The Industrial Court in Award No. 39 of 2001 held that the respondent had been dismissed without just cause or excuse and awarded the respondent backwages as well as compensation *in lieu* of reinstatement. The Federal Court in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687 at p. 710 affirmed the following extract from the judgment of the Court of Appeal in *Syarikat Kenderaan*'s case which accurately depicts the present state of the law governing *certiorari* proceedings:

> An inferior tribunal or other decision making authority, whether exercising a quasi judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision maker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzaman v. Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.
>
> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account relevant considerations (what may be conveniently termed as Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or mistates a principle of the general law.

It is noted that in concluding the charge (f) against the respondent had not been proven, the Industrial Court had weighed the facts presented against the backdrop of a standard of proof of "beyond reasonable doubt" as opposed to "a balance of probabilities". The Industrial Court held:

> Even assuming that the claimant had misrepresented himself the company has failed to prove that he had done so fraudulently. There is not a shred of evidence to support the company's allegation that it was done fraudulently. The company was basing its allegation of fraud on a mere conjecture. The fact that the claimant was in the employ of the company at the material time does not necessarily mean that he had not been authorised by Lippowak to sign on its behalf. The company has failed to adduce any evidence of dishonesty on the part of the claimant. The claimant was not proved by the company to have benefited from it in any manner. The company should have called Frederick Wong Tiew Seh to testify as he would be in a position to say whether the claimant was authorised by him or not. Therefore for the same reason there is no evidence of misrepresentation by the claimant.

I think a reading of the foregoing extract from the Industrial's Court award will amply demonstrate that the Industrial Court was addressing its mind to the issue of whether or not the company had proven that the misconduct was committed by the claimant, beyond reasonable doubt. In doing so, I am of the opinion that the Industrial Court had committed a fundamental error in law in that it failed to apply its mind to the correct test applicable, ie, that the reason for the dismissal of an employee is grounded on a set of facts known to the employer or a set of beliefs held by him at the time of dismissal. Such a test is measured against a standard of proof on a balance of probabilities. Here the court is faced with civil proceedings, the standard applicable is on a balance of probabilities and the Industrial Court's erroneous reliance on a standard of proof beyond reasonable doubt affected the entire basis of its' award. The foregoing proposition in law was enunciated in the case of *Ferodo Ltd v. Barnes (EAT)* [1976] ICR 439. In *Ferodo's* case, the employee was dismissed for an act of vandalism in the toilets at the factory premises. On his complaint of unfair dismissal an industrial tribunal held that since they were not satisfied on the evidence before them that the employee was guilty of vandalism, the employers failed to show a reason justifying the employee's dismissal. The employers appealed against the decision of the industrial tribunal on the ground that the industrial tribunal had erred in holding that the employers had to establish that the employee was guilty of the misconduct with which he was charged to justify dismissing him. In allowing the appeal on the grounds that the industrial tribunal had misdirected itself in law, His Lordship Kilner Brown J held at p. 440:

> The question which falls to be decided in circumstances such as these is not whether or not the alleged offence is proved but whether or not the employers after careful investigation, and after adopting the appropriate procedures enshrined in the Code of Practice, came to a reasonable decision that dismissal must follow.

His Lordship went on further to state at p. 441:

> … the law is quite plain and that what the industrial tribunal ought to do is, not ask itself the question which this tribunal did - "Are we satisfied that the offence was committed?" - but to ask itself the question, "Are we satisfied that the employers had, at the time of the dismissal, reasonable grounds for believing that the offence put against the employee was in fact committed?

This approach has been consistently applied by the Industrial Court in determining whether a dismissal was with just cause or excuse. In the case of *Utusan Melayu (M) Bhd v. National Union of Journalist Malaysia* [1991] 2 ILR 840, the Industrial Court held that the dismissal of the claimant was without just cause or excuse in that based on the evidence adduced in relation to the charges leveled against the claimant, the company did not act reasonably in forming its view of the facts, in the sense that it had not drawn certain factual conclusions upon reasonable grounds and it had not made reasonably diligent investigations to ascertain the facts. In its award, the Industrial Court adopted the following test from *Ferodo Ltd. v. Barnes supra*, wherein the tribunal had said *inter alia* at p. 843:

> It must be remembered that in dismissing an employee including a dismissal where the reason is criminal conduct, the employer need only satisfy himself that at the time of the dismissal, there were reasonable grounds for believing the offence put against the employee was committed. The test is not whether the employee did it but whether the employer acted reasonably in thinking the employee did it and whether the employer acted reasonably in subsequently dismissing him.

Similarly in *Shell Malaysia Trading Co. Sdn. Bhd. v. National Union of Petroleum & Chemical Industry Workers* [1986] ILR 677, the company made an application under s. 33A of the Industrial Relations Act 1967 to refer two questions of law to the High Court pursuant to the Industrial Court's Award No. 25 of 1986 in favour of the claimants. The company's application was dismissed, however in determining when to reverse the company's decision of dismissal, the court adopted the following principles from Soonavala's "*The Supreme Court of Industrial Law*" (1979) edn. (at p. 679):

> It is for the management to determine whether the act of the workman constitutes misconduct and whether it merits an or of dismissal. However, in determining such misconduct it must have facts upon which to base its conclusions and it

> must act in good faith without caprice or discrimination and without any motive of victimisation or intimidation or resorting to unfair labour practice, and there must be no infraction of the accepted rules of natural justice. When the management does have facts from which it can conclude misconduct, its judgment cannot be questioned, provided the above mentioned principles are not violated. On the other hand, in the absence of these facts, or in the case of violation of the above mentioned principles, its position is untenable, and it becomes a fit case for interference by the tribunal.

I think here this was not an instance of the applicant acting on no evidence. On an application of the foregoing principles and in the absence of *mala fide*, victimisation or discrimination against the respondent, the Industrial Court should have addressed its mind as to whether the applicant could reasonably conclude that the respondent was guilty of the misconduct on a balance of probabilities based on the prevailing set of facts, circumstances and evidence at the time of dismissal. Accordingly, it is my conclusion that it's failure to address it's mind to the correct test and standard of proof, resulted in a decision that was perverse and unreasonable which no other tribunal in similar circumstances would have reached and on this ground alone an order of *certiorari* should be issued.

I must state here that there are numerous authorities to support the proposition that the Industrial Court's application of the wrong test to the facts of the matter before it, amounts to a fundamental error of law which renders it's decision susceptible to an order of *certiorari* being issued. In *Bayer (M) Sdn. Bhd. v. Anwar bin Abdul Rahim* [1996] 2 CLJ 49 one of the grounds on which the High Court quashed the Industrial Court's decision was based on its failure to apply the correct test. The High Court held that at p. 54:

> The Industrial Court, in making the impugned award, erred in law in failing to apply the proper legal test governing a case based on a constructive dismissal. The Industrial Court's finding that the conduct of the applicant was not justifiable, not *bona fide* and so constitutes embarrassment clearly shows that it had erroneously applied 'the test of reasonableness' and not the contract test and so has acted in excess of jurisdiction constituting an error of law.

The Court of Appeal in *Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 CLJ 197 upheld the High Court's decision and this decision was subsequently affirmed by the Federal Court.

An order of *certiorari* was also issued to quash the Industrial Court's decision in the case of *Funai Electric (M) Sdn Bhd v. Saliah Ahmad* [2000] 2 CLJ 655 which related to the claimant's plea of constructive dismissal arising out

of a transfer from the Shipping Department to the Service Area Parts Department. The relevant portion of the judgment is as follows at p. 660 - 661:

> The Industrial Court having recognised that the company had the prerogative of transfer - in fact it was a term of her appointment and she had agreed that the company was acting within the terms of "transfer" - the Industrial Court was clearly wrong in using the test of "unreasonableness" on the transfer when the test should be in accordance with the Supreme Court case of *Wong Chee Hong* whether the Company was guilty of a breach which went to the root of the contract or if the company evinced an intention no longer to be bound by it, "the contract test".

Although *Bayer's* case and *Funai's* case relate to cases of constructive dismissal, the principle derived from the foregoing cases applies equally in the present instance. Had the Industrial Court applied the standard of proof and test as set out i*n Ferodo v. Barnes* and weighed the evidence before it against that, it would have arrived at a different decision altogether. The Industrial Court's failure to weigh the evidence before it against a standard of a balance of probabilities as opposed to beyond reasonable doubt, renders it's award susceptible to an order of *certiorari*.

I am mindful of the principles governing *certiorari* in that this court reviews the manner in which the Industrial Court arrives at its decision and it does not sit as an appellate court. However, the court is entitled to review the decision for substance if the decision was being challenged on the grounds of perversity or unreasonableness. An examination of the merits of the decision followed by a result that no reasonable person or body similarly circumstanced could have come to the conclusion in question and a making of the decision that ought to have been made in the first place, would not occasion an abuse of judicial power by an unjustified or unauthorised assumption of appellate power in *certiorari* proceedings. I think I am entitled to carry out an objective examination of the factual matrix presented to the Industrial Court to ascertain whether a reasonable tribunal similarly circumstances would have come to a like conclusion. In *R. Rama Chandran v. Industrial Court of Malaysia & Anor*. [1977] 1 CLJ 147, His Lordship Edgar Joseph Jr FCJ in delivering the decision of the Federal Court stated that at p. 172:

> It is often said that judicial review is concerned not with the decision but the decision making process. (See eg. *Chief Constable of North Wales v. Evans* [1982] 1 WLR 115). This proposition, at full value, may well convey the impression that the jurisdiction of the Courts in judicial review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to

which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.

But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinise such decisions not only for process, but also for substance.

In this context it is useful to note how Lord Diplock defined the three grounds of review, to wit, (i) illegality, (ii) irrationality and (iii) procedural impropriety. This is how he put it:

> By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of a dispute, by those persons, the Judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as "Wednesbury Unreasonableness" (see *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1984] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrive at it.

Accordingly in this case I have to examine the charges leveled against the Respondent and the evidence relied upon by the applicant at the time of dismissal to ascertain whether the dismissal was justified.

Charge (f) reads:
That you, in your capacity as Executive - Konnas Maritime Services Sdn. Bhd. (KMS), had negligently failed to exercise due diligence and good commercial sense:

> In that you, sometime in July 1995, fraudulently mispresented yourself as a representative of Lippowak Shipping Sdn. Bhd. whilst being in the gainful employment of Konnas Maritime Services Sdn. Bhd.

Based on the foregoing, as long as the applicant adduced evidence to show that the respondent had misrepresented himself as a representative of Lippowak Shipping Sdn. Bhd. whilst in employment with the applicant and in doing so had negligently failed to exercise due diligence and good commercial sense, this charge would have been proven. In this regard, the Industrial Court had failed to consider COW1's evidence that the Respondent had no authorisation

to sign on behalf of Lippowak (p. 4 encl. 4 of supplementary affidavit of Rahmat bin Ismail). It was also in evidence that the respondent had signed COB1 (at p. 124 of affidavit of Rahmat bin Ismail) on behalf of the Managing Director of Lippowak Shipping. COW4 also gave evidence that it was not normal for an employee of the applicant to sign a letter on behalf of it customer and that the normal practice is to ask the ship owners to make advance payment to Kontena Nasional or the Company to cover all disbursements (p. 5 encl. 4 of supplementary affidavit of Rahmat bin Ismail). The court had failed to consider (p. 160 of affidavit of Rahmat bin Ismail) which effectively demonstrated that arising out of this document which states Lippowak had appointed Kontena Nasional Berhad as their agent in Johor Port and Kontena Nasional Berhad had agreed that Lippowak's vessel disbursement be credited to their account, the applicant had suffered losses due to the outstanding balance which could not be recovered (p. 169 of affidavit of Rahmat bin Ismail). Surely this amounted to negligence in failing to exercise due diligence and good commercial sense. In light of the foregoing, there was no requirement to call Frederick Wong Tiew Seh as a witness in light of COW1's evidence. The Industrial Court gave no reason for rejecting COW1's evidence nor was it rejected on grounds of credibility. It's only reason for failing to take into account COW1's evidence was due to it's failure to call one Frederick Wong Tiew Seh. Accordingly, it is my conclusion that the Industrial Court's failure to weigh the documentary and oral evidence before it against a standard of balance of probabilities, amounted to a misdirection in law and a decision which was perverse and unreasonable. Support for the foregoing proposition is found in the case of *Ang Hiok Seng @ Ang Yeok Seng v. Yim Yut Kiu (personal representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45, where the Federal Court held at (3):

> ... However, where the allegation of fraud is entirely founded on civil fraud and not on criminal conduct or offence, a balance of probability is applicable. In this case, since the allegation of fraud was purely civil in nature and not based on or connected with a criminal offence, the civil standard was applicable.

The issue of whether the respondent stood to gain personally from his act was irrelevant as for all intents and purposes he had no authorisation to sign on behalf of another company when he was in employment with the applicant. A misrepresentation is a false statement of existing/part fact made by one party before/at the time of making the contract which addressed to the other party and which induces the other to enter the contract. This the respondent had done, what more proof was needed to establish charge (f). In the case of *MAS v. AT Xavier* [1983] 1 ILR 44, the Industrial Court was of the view that the claimant's false representation amounted to a misconduct sufficient to justify summary dismissal. In the instant case the court concluded that there

was no evidence to support the company's allegation of fraud. In *Derry v. Peek* [1889] 14 App. Cas. 337 Lord Herschell gave a succinct explanation of fraud at p. 374:

> ... Secondly, fraud is proved when it is shown that a false representation has been made, (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states.

In the instant case, the respondent had clearly made a false statement to Johor Port and without belief in its truth. Whether or not the respondent stood to gain anything personally from such an act was immaterial as the fact of the matter remains that he was not given any authorisation to sign. In light of COW1's testimony that the respondent could not sign on behalf of Lippowak, what was the necessity to call Frederick Wong Tiew Seh as a witness. Accordingly, I view that the foregoing matters were irrelevant matters to be taken into consideration. In concluding that Frederick Wong Tiew Seh had to be produced and that the applicant had failed to prove that the respondent stood to gain personally from his act, amounted to irrelevant matters which should not have been taken into consideration. In taking such factors into consideration, the Industrial Court had undoubtedly arrived at a decision which was perverse and unreasonable.

Charge (h) reads:

That you, in your capacity as Executive - Konnas Maritime Services Sdn. Bhd. (KMS), had negligently failed to exercise due diligence and good commercial sense:

> In that you, sometime between June 1995 and July 1995 played an active role in the return of a cheque issued by Milupol Development Corporation as payment of vessel disbursement expenses without first obtaining a replacement cheque.

The Industrial Court however concluded that:

> What the charge says is the claimant played an active role in the return of the cheque and that he did return the cheque to Milupol without first obtaining the replacement.

A reading of the foregoing will amply demonstrate that the Industrial Court completely misconstrued the charge before it. The essence of the charge was that the respondent had negligently failed to exercise due diligence and good commercial sense when he had returned the cheque issued by Milupol without

obtaining a replacement cheque. The Industrial Court failed to consider that it was the respondent's conduct that stopped the cheque from being banked in. Further it was the respondent who also failed to obtain a replacement cheque having returned the cheque to Milupol and thereby was the cause of the loss suffered by the applicant. In view of the fact that it was the respondent who had requested for the return of the cheque, surely it was his responsibility to ensure that payment was effected subsequently. When the respondent was told to get a replacement cheque, he failed to do so. Accordingly, the respondent perpetrated the act to estop the cheque from being banked in and was the catalyst in allowing the said cheque to expire without replacement. The foregoing were matters which went to the crux of the charge, however the Industrial Court chose to demonstrate blatant disregard to the same. In case of *OMX Agro Produce (M) Sdn. Bhd. v. Chairman Industrial Court Malaysia & Anor* [1999] 5 MLJ 636, one of the grounds on which the learned High Court Judge had issued an order of *certiorari* was due to the Industrial Court's failure to scrutinize all evidence and the pleaded facts and make a finding on the same. In *OXM*'s case, the learned chairman in his award narrated the evidence of the claimant and accepted it uncritically. The court stated at p. 638:

> Having heard arguments of learned counsel of both the applicant and the second respondent and having gone through the record and other connected documents, my view is that the grounds relied upon by the chairman for making his award appeared to be one sided; he readily accepted the evidence of the claimant without testing it against other evidence and was content to rely on the "I believe him" formula. The chairman did not come to grips with the issues raised in the pleadings and the distinct impression that one gets is tht the chairman had lost himself in a thicket of irrelevant issues and evidence, looses and uncritical analysis of evidence and wrong inferences and one had to bear in mind the case of *R Rama Chandran v. the Industrial Court of Malaysia & Anor*. [1997] 1 MLJ 245 which reiterates a long line of principles decided earlier that parties are bound to their pleadings and that the Industrial Court cannot consider or admit evidence which is irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion; the court must address its mind on fundamental issues.

The court was more concerned as to whether the respondent was in charge of accounts. This was an irrelevant consideration. The respondent was aware that there were insufficient funds when he gave COW2 the cheque when he had called her telling COW2 not to bank in the cheque. It was immaterial as

to whether the respondent was in charge of accounts or whether COW3 was obliged to return the cheque to the respondent as it was his responsibility to obtain the replacement cheque having regard to the fact that he prevented the cheque from being banked in.

For these reasons an order of *certiorari* must be issued to quash the Industrial Court's award which is riddled with errors in law. Order in terms of prayer (a) and (c) of the application is hereby granted.